

In the Matter of the Compensation of  
**MARK ACUNA, Claimant**  
WCB Case No. 21-04691  
**SECOND ORDER ON RECONSIDERATION**  
Julene M Quinn LLC, Claimant Attorneys  
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Curey and Ousey.

On January 20, 2023, as reconsidered on February 21, 2023, we adopted and affirmed an Administrative Law Judge's (ALJ's) order that: (1) awarded a penalty and penalty-related attorney fee for the SAIF Corporation's discovery violations; and (2) compelled SAIF to provide all discoverable documents, including claimant's wage and hour information. In addition, in response to claimant's request for bifurcation of his counsel's attorney fee award for services on Board review, we awarded a reasonable attorney fee in an amount to be determined in WCB Case No. 22-00006BF. *See* OAR 438-015-0125. However, upon further consideration, we have concluded that bifurcation of claimant's attorney fee award under ORS 656.382(3) is not authorized. *See* OAR 438-015-0125(1); *Francheter Harvey*, 75 Van Natta 65, 72 (2023). Consistent with such reasoning, we have dismissed WCB Case No. 22-00006BF. *Mark Acuna*, 75 Van Natta \_\_ (issued this date). Instead, because the amount of claimant's counsel's ORS 656.382(3) attorney fee award has not been finally determined, we proceed with our review of that issue.<sup>1</sup> Having received the parties' supplemental briefs and claimant's counsel's statement of services, we proceed with our consideration of the attorney fee issue.

In our initial order, we found that the ALJ's penalty and penalty-related attorney fee awards should not be disallowed or reduced. Therefore, claimant's counsel is entitled to an assessed fee under ORS 656.382(3) for services on review. *See Austin B. Wilson*, 73 Van Natta 799, 799 (2021) (the claimant's attorney was entitled to an assessed attorney fee under ORS 656.382(3) for services on review regarding penalty and attorney fee awards that were not disallowed or reduced).

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<sup>1</sup> Our January 20, 2023, order affirming the ALJ's penalty and penalty-related attorney fee determinations and our February 21, 2023, order awarding an attorney fee for claimant's counsel's services on reconsideration have not been appealed, are final, and will not be reconsidered. *See* ORS 656.295(8).

Claimant's counsel requests a \$27,454.80 attorney fee based on a proposed \$904 contingent hourly rate. SAIF objects to counsel's fee request and proposes a \$6,000 attorney fee at a \$400 contingent hourly rate. Based on the following reasoning, we find that a reasonable attorney fee award for claimant's counsel's services on review is \$7,000.

In determining a reasonable attorney fee award, we apply the factors set forth in OAR 438-015-0010(4) to the circumstances of each case. *See Schoch v. Leupold & Stevens*, 325 Or 112, 118-19 (1997). Those factors are: (1) the time devoted to the case; (2) the complexity of the issue(s) involved; (3) the value of the interest involved; (4) the skill of the attorneys; (5) the nature of the proceedings; (6) the benefit secured for the represented party; (7) the necessity of allowing the broadest access to attorneys by injured workers; (8) the fees earned by attorneys representing the insurer/self-insured employer, as compiled in the Director's annual report under ORS 656.388(7) of attorney salaries and other costs of legal services incurred by insurers/self-insured employers pursuant to ORS Chapter 656; (9) the risk in a particular case that an attorney's efforts may go uncompensated; (10) the contingent nature of the practice of workers' compensation law; (11) the assertion of frivolous issues or defenses; and (12) claimant's counsel's contingent hourly rate, if asserted, together with any information used to establish the basis on which the rate was calculated.<sup>2</sup>

In *Karista D. Peabody*, 73 Van Natta 244, *recons*, 73 Van Natta 362 (2021), *rev'd on other grounds*, 326 Or App 132 (2023), we concluded that, because the attorney fee request was based, in part, on the claimant's counsel's reported hours and proposed contingent hourly rate, it was appropriate to use that information as a starting point for our application of the rule-based factors. Because that information has been submitted in this case, consistent with our *Peabody* rationale, we follow the same approach.

Here, claimant's counsel reported 31.2 hours for services on review. Among these hours, 14.5 pertained to preparing claimant's respondent's brief. The brief was 21 pages, 11 of which were devoted to the "jurisdiction" issue asserted by SAIF. However, claimant's "jurisdiction" arguments regarding the statutory construction of ORS 656.262(11)(a) and whether the Workers' Compensation Division's (WCD's) or the Board's discovery rules applied were not helpful to

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<sup>2</sup> We are not required to make findings for each rule-based factor. *See Weyerhaeuser Co. v. Fillmore*, 98 Or App 567, 571 (1989) (the Board is not required to make findings as to each rule-based factor regarding a reasonable attorney fee award, but the Board's explanation must be detailed enough to establish a reasonable basis for its decisions); *Christopher Taylor*, 73 Van Natta 439 (2021) (same).

our “jurisdiction” determination. *See David C. Sellers*, 69 Van Natta 1336, 1339 (2017) (the Board’s jurisdiction over a discovery hearing request was dependent on whether there was a request for an order to compel the production of records); *see also James L. Williams*, 65 Van Natta 874, 877 (2013) (the Hearings Division had jurisdiction over the discovery issue regardless of whether the WCD’s or the Board’s rules applied). Here, claimant’s respondent’s brief did not include an analysis of the *Sellers/Williams* cases or the reasoning expressed in those decisions. Under such circumstances, we consider 10 hours (rather than the reported 14.5) to be reasonable for claimant’s respondent’s brief. *See Ariel Fillinger*, 73 Van Natta 730, 734 (2021) (fewer hours considered reasonable for preparing the claimant’s brief that included arguments not well supported or helpful).

Claimant’s counsel reported 7.7 hours for preparing the supplemental briefing regarding the attorney fee issue. We acknowledge that claimant’s counsel is entitled to a reasonable attorney fee for services pertaining to arguing the reasonableness of an attorney fee award. *See Peabody*, 326 Or App at 139. In addition, we consider claimant’s counsel’s reported 1 hour for negotiating the attorney fee issue with SAIF’s counsel to be reasonable. However, we find 7.7 hours for briefing the attorney fee issue (more than half the 14.5 reported hours briefing the substantive issues in this case) to be excessive. The attorney fee issue was not complex. Under such circumstances, we consider 2.3 hours (rather than the reported 7.7) to be reasonable for the supplemental briefing on the attorney fee issue.

Claimant’s counsel reported 2.2 hours for reviewing new discovery produced by SAIF in September 2022 (after the request for review) and May 2023 (after our initial order). Although claimant’s counsel’s time reviewing the record and the 2021 discovery at issue in this case was reasonable, the 2022 and 2023 discovery was not a part of the record or particularly relevant to the 2021 discovery at issue. Under such circumstances, we consider 1 hour (rather than the reported 2.2) to be reasonable for claimant’s counsel’s review of the new discovery.

Claimant’s counsel reported 1.7 hours in February 2023 to update claimant’s former attorney about our January 20, 2023, order and the status of the case. While it was reasonable for claimant’s counsel to have spent 1.2 hours in June and July 2022 to initially discuss the case with claimant’s former attorney, we do not consider the 1.7 hours in February 2023 (at which point claimant’s counsel had been claimant’s only attorney of record for eight months) to be reasonable.

Claimant's counsel's statement of services also includes 1.6 hours for responding to SAIF's motion for reconsideration. However, we have already awarded a \$750 attorney fee for claimant's counsel's services pertaining to SAIF's motion for reconsideration.<sup>3</sup> See *Mark Acuna*, 75 Van Natta 78, 79 (2023). Therefore, we decline to consider the 1.6 hours reported regarding SAIF's motion for reconsideration.

Citing *Bowman v. SAIF*, 278 Or App 417 (2016), claimant's counsel reported 1 hour for "wrap-up work." Specifically, claimant's counsel seeks an attorney fee for work not yet performed, including reviewing any Board order, communicating with claimant and his former attorney, and monitoring fee payments. However, the relevant attorney-fee factor is the "time devoted to the case," not the time the claimant's counsel may devote to the case in the future. See OAR 438-015-0010(4)(a). Further, *Bowman* did not award an attorney fee for future work. Rather, that case pertained to an ORS 656.386(1) attorney fee award that considered litigation-related work (that the claimant's counsel had actually performed) after the carrier notified the claimant's counsel of its intent to rescind the denial. 278 Or App at 426.

Under such circumstances, for the reasons set forth above, we consider 15.5 hours (rather than the 31.2 reported hours) to be reasonable for claimant's counsel's services on Board review.

Citing *Peabody*, claimant's counsel proposes a \$904 contingent hourly rate based on a \$350 noncontingent hourly rate divided by 0.387, which claimant asserts is the "win rate" for claimants.<sup>4</sup> However, *Peabody* did not require a win-loss multiplier, nor did it create a hard-and-fast rule for calculating an attorney fee award based on an attorney's asserted noncontingent hourly rate. 73 Van Natta at 252-53; see also *Paul F. Johnson*, 73 Van Natta 1070, 1071 n 3 (2021) (rejecting the application of an attorney fee multiplier based on a specific win-loss ratio). Therefore, based on our review of this particular record, our extensive experience as Board members and workers' compensation practitioners, and the additional attorney-fee factors discussed below, we consider \$450 (rather than the proposed

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<sup>3</sup> As noted above, the attorney fee awarded for services on reconsideration will not be reconsidered.

<sup>4</sup> Claimant's counsel also cites Workers' Compensation Division (WCD) Bulletin No. 356 in support of the proposed \$904 contingent hourly rate. However, this bulletin applies to ORS 656.385(1) attorney fees regarding vocational assistance disputes, not ORS 656.382(3) attorney fees for defending a discovery penalty. See OAR 436-001-0410.

\$904) to be a reasonable, contingent hourly rate in this case.<sup>5</sup> See OAR 438-015-0010(4)(1); see, e.g., *Julie Hooks*, 74 Van Natta 196, 199 (2022) (\$425 was a reasonable, contingent hourly rate on review); *Fillinger*, 73 Van Natta at 735 (\$450 was a reasonable, contingent hourly rate on review); *Chauntelle A. Olson*, 73 Van Natta 583, 599 (2021) (\$425 was a reasonable, contingent hourly rate on review).

We turn to the complexity of the issues. Considering the range of complex issues submitted to this forum, we find that the jurisdiction issue was of average complexity. See *Sellers*, 69 Van Natta at 1339. The discovery/penalty issue was more complex than the average discovery/penalty issue because it involved analysis regarding whether the WCD's rules or the Board's rules applied. In addition, both claimant's counsel and SAIF's counsel are skilled and experienced appellate workers' compensation practitioners.

Further, because of the contingent nature of workers' compensation law, there was a risk that claimant's attorney might go uncompensated. However, that risk was not particularly high in this case because claimant was successful at the hearing level and was the respondent on review. See *Hooks*, 74 Van Natta at 198 (the risk of going uncompensated was less where the claimant was the respondent on review).

Finally, we turn to the value of the interest involved and benefit secured for claimant. Claimant did not secure any compensation as a direct result of our initial order. However, he obtained a penalty in the amount of 25 percent of all compensation due as of November 24, 2021. In addition, claimant secured an order compelling SAIF to produce discovery that it had not produced for months, despite claimant's multiple and continued requests. We find value in securing an order that penalizes SAIF's discovery violations because a carrier's compliance with its discovery obligations is essential to ensure a fair and expeditious administrative process.

In sum, based on the foregoing reasoning, we consider 15.5 hours at a \$450 contingent hourly rate to be reasonable for claimant's counsel's services on review. Thus, considering the additional attorney-fee factors discussed above, we find that

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<sup>5</sup> Claimant's counsel also cites the 2017 Oregon State Bar Economic Survey in support of the proposed \$904 contingent hourly rate. While such survey information may be relevant in some cases, we are not persuaded that it supports the proposed \$904 contingent hourly rate in this particular case. See *Fillinger*, 73 Van Natta at 735 n 5 (survey information did not persuasively support the proposed contingent hourly rate).

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\$7,000 represents a reasonable, assessed attorney fee award for claimant's counsel's services on Board review. ORS 656.382(3); OAR 438-015-0010(4); *see, e.g., Harvey*, 75 Van Natta at 72 (\$500 attorney fee awarded under ORS 656.382(3) for services on review regarding a discovery violation penalty issue); *Wilson*, 73 Van Natta at 799 (\$4,000 attorney fee awarded under ORS 656.382(3) for services on review regarding a discovery violation penalty issue).

Accordingly, on reconsideration of only the attorney fee award granted in our January 20, 2023, order, claimant's counsel is awarded an assessed attorney fee of \$7,000, to be paid by SAIF.

**IT IS SO ORDERED.**

Entered at Salem, Oregon on July 27, 2023